SUPREME COURT, U. S.

(41408)

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1267

In the Matter of the Application of

MICHAEL S,

Petitioner,

—against—

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR RESPONDENT IN OPPOSITION

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Question Presented

Where a juvenile court petition is dismissed for failure of proof beyond a reasonable doubt that a juvenile is a person in need of supervision, does the juvenile have a constitutional right to eradication of his name from juvenile court and police records of the matter?

Statement of the Case

Petitioner had been adjudicated a person in need of supervision under a "preponderance of the evidence" standard of proof, and the juvenile court order was affirmed on appeal to the Appellate Division, First Department, of the

New York Supreme Court. It was later established in another case that proof beyond a reasonable doubt was required in such cases and that the requirement was to be applied retroactively. Thereafter, the Appellate Division granted reargument, vacated its prior order of affirmance, reversed the juvenile court adjudication, and dismissed the petition. 40 AD 2d 633, 336 N. Y. S. 2d 214.

Thereupon petitioner moved in the juvenile court for an order "directing the expungement of all court and police records relating to his arrest, trial and adjudication . . . as a person in need of supervision." The motion was denied without opinion. The Appellate Division, First Department, of the New York Supreme Court affirmed without opinion (42 AD 2d 693), and the New York Court of Appeals denied leave to appeal (33 NY 2d 519).*

No application was made to seal the juvenile court records. Cf. Pet., p. 11. Petitioner may still apply for that relief, the grant of which lies within the judicial discretion of the juvenile court.

Argument

(a)

State ex rel. Mavity v. *Tyndall*, 225 Ind. 360, 74 N. E. 2d 914 (1947), appeal dismissed for want of a substantial federal question, 333 U.S. 384, reh. den. 333 U.S. 858, involved a refusal to compel destruction of police records which would identify the relator as a person who had been arrested. The charges against him had been dismissed subsequent to the arrest. In denying relief, the Indiana

* It follows that, if certiorari were to be granted, the writ should be directed to the Appellate Division and not to the New York Court of Appeals (Cf. Pet., pp. i-ii, 30).

Supreme Court held that the statutes which authorized retention of the records did not violate the Equal Protection or Due Process clauses.

In *Herschel* v. *Dyra*, 365 F. 2d 17 (7th Cir. 1966), cert. den. 385 U.S. 973 (1966), the Court of Appeals held that there was no "right of privacy" which was denied by the preservation of records of an arrest on a charge which was later dropped.

See also *Matter of Peabody* v. *Francke*, 4 AD 2d 962 (2nd Dept., 1957), lv. app. den. 4 NY 2d 673, cert. den. 357 U.S. 941 (1958), reh. den. 358 U.S. 859. There the New York courts refused to direct the expunction of a record of a conviction which had been reversed. A new trial had been ordered, but it never took place, and the criminal proceeding had been dismissed.

Authority preponderates against expunction, at least where the arrest or prosecution has not been an incident of violation of the constitutional rights of the person seeking expunction. See Annotation, *Right of exonerated arrestee to have fingerprints, photographs or other criminal identification or arrest records expunged or restricted*, 46 ALR 3d 900 (1972). To the cases there cited may be added *United States* v. *Rosen*, 343 F. Supp. 804 (DC, S.D. N.Y. 1972), and *United States* v. *Dooley*, 364 F. Supp. 75 (D.C., E.D. Pa., 1973), which denied expunction.

Petitioner's practical grievance (Pet., pp. 5, 16-29) is not that the maintenance of an unaltered record is intrinsically harmful or that the statutory restrictions upon their divulgence (New York Family Court Act, §§ 166, 783, 784) are too narrow, but rather that there are unauthorized disclosures to persons such as potential employers who give the records an unjustified significance to the detriment of persons such as petitioner. But, just as otherwise

constitutionally protected conduct is not to be proscribed because of wrongful reactions to it [*Wright* v. *Georgia,* 373 U.S. 284, 293 (1963); *Watson* v. *Memphis,* 373 U.S. 526, 535-536 (1963)], otherwise innocuous conduct is not rendered unconstitutional because others illegally apply it for their own purposes. The remedy is to enforce existing law.

(b)

It has been noted that, even in the case of a juvenile who has been detained and then released without further proceedings, preservation of records may serve a useful purpose in the event the juvenile should later come to the attention of the court. *T. N. G.* v. *Supreme Court of City & Co. of San Francisco,* 94 Cal. Rptr. 813, 481 P. 2d 981, 992 (1971).

It may be added that such preservation may be necessary for the protection of those who, despite the juvenile's innocence, may not have acted tortiously in connection with his detention or the court proceeding. In New York a juvenile may wait until he is 21 years old before bringing a damage action. New York Civil Practice Law and Rules, 208. With the passage of time, however, only court records may be available to provide evidence of justification for what otherwise might be held to be false imprisonment or malicious prosecution. Cf. *Matter of Molineux* v. *Collins,* 177 N.Y. 395, 399, 69 N.E. 727, 728 (1904).

CONCLUSION

The petition for a writ of certiorari should be denied.

February 26, 1974.

Respectfully submitted,

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